



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 9, 1998

Mr. Ryan Tredway  
Texas Department of Insurance  
Legal and Compliance Division, Mail Code 110-1A  
P. O. Box 149104  
Austin, Texas 78714-9104

OR98-2640

Dear Mr. Tredway:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 119379.

The Texas Department of Insurance (the "department") received a request from Consumers Union for a copy of the independent valuation report (the "report") of Blue Cross Blue Shield of Texas, Inc. ("Blue Cross") prepared by Coopers & Lybrand, L.L.P. ("Coopers & Lybrand") at the request of the department. You contend that the report is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with various provisions of the Insurance Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You also contend that the report is excepted from disclosure under section 552.112 of the Government Code. Section 552.112(a) excepts from disclosure "information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both."

On behalf of Blue Cross, you also raise section 552.305 of the Government Code. Since you indicate that the proprietary interests of Blue Cross may be implicated by the release of the report, this office notified Blue Cross about the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body

to rely on interested third party to raise and explain applicability of exception in certain circumstances). Blue Cross responded by claiming that the report is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with various provisions of the Insurance Code. Blue Cross also contends that the report is excepted from disclosure under sections 552.110, 552.111, and 552.112 of the Government Code.

The report at issue relates to the proposed merger of Blue Cross with Blue Cross Blue Shield of Illinois. Article 21.49-1 of the Insurance Code governs the acquisition of a domestic insurance company authorized to do business in the State of Texas. Section 3 of article 21.49-1 requires domestic insurers to file a registration statement with the Commissioner of Insurance (the "commissioner"). Ins. Code art. 21.49-1, § 3(a). A party seeking to acquire control of a domestic insurer (the "acquiring party") must file a statement, known as a Form A application, with the commissioner. *Id.* § 5(a). The Form A application must contain the categories of information enumerated in section 5(b) of article 21.49-1. *Id.* § 5(a), (b) (list of twelve items that Form A application must include). The acquiring party's Form A application is open to public inspection, and thus cannot be withheld from disclosure pursuant to exceptions in the Open Records Act. *Id.* § 5(a); Open Records Decision No. 525 (1989) (exceptions in Open Records Act generally do not apply to information made public by other statutes).

Section 5(b)(3)(iii) provides that the acquiring party's Form A application must include "additional financial information in the form or substance as required by the commissioner which is material to the finding required by Subsection (c)(1)(iii)." Ins. Code art. 21.49-1, § 5(b)(3)(iii). Section 5(b)(12) states that the Form A application shall also include "such additional information as the commissioner may by rule or regulation prescribe as necessary or appropriate to the protection of policyholders of the insurer or in the public interest." *Id.* § 5(b)(12). In addition to the information contained in the acquiring party's Form A application, article 21.49-1 gives the commissioner discretion to obtain information he deems relevant to his analysis of the proposed merger or acquisition. Section 5(c)(3) provides:

The commissioner may retain any attorney, actuary, accountant, or other expert not otherwise a member of the commissioner's staff as may be reasonably necessary to assist in analyzing any merger or acquisition of control proposed under this section. All reasonable expenses incurred in connection herewith shall be borne by the acquiring party.

Ins. Code art. 21.49-1, § 5(c)(3). Section 9(a) permits the commissioner to conduct an examination of a domestic insurer that is the subject of an acquiring party's Form A application. Section 9 provides:

(a) Power of the Commissioner. Subject to the limitation contained in this section and in addition to the powers which the commissioner has under other articles of this code relating to the examination of insurers, the commissioner shall also have the power to order any insurer registered under section 3 to produce such records, books, or other information papers in the possession of the insurer, its holding company, its subsidiaries, or its affiliates as shall be necessary to ascertain the financial condition or legality of conduct of such insurer . . . .

(b) Purpose and Limitation of Examination. The commissioner shall exercise his power under Subsection (a) above only if the examination of the insurer under other sections of this code is inadequate or the interests of the policyholders of such insurer may be adversely affected.

(c) Use of Consultants. The commissioner may retain at the registered insurer's expense such attorneys, actuaries, accountant, and other experts not otherwise a part of the commissioner's staff as shall be reasonably necessary to assist in the conduct of the examination under Subsection (a) above. Any persons so retained shall be under the direction and control of the commissioner and shall act in a purely advisory capacity.

(d) Expenses. Each registered insurer complying with the commissioner's order and producing for examination records, books, and papers pursuant to Subsection (a) above shall be liable for and shall pay the expense of such examination in accordance with Article 1.16 of this code.

Ins. Code art. 21.49-1, § 9.

The department informs us that the commissioner directed Coopers & Lybrand to compile the report on Blue Cross pursuant to section 9(a). If the report is the result of an examination under section 9(a), then section 10 of article 21.49-1 deems the report confidential. *Id.* § 10 (all information obtained by commissioner in examination made pursuant to section 9 shall be given confidential treatment). Under these circumstances, the report is excepted from disclosure under section 552.101 of the Government Code as information deemed confidential by law.

Based in part on language contained in the department's letter of July 30, 1996, to representatives of Blue Cross, Consumers Union contends that the commissioner ordered the report pursuant to his authority under section 5(c)(3).<sup>1</sup> Consumers Union further contends that information obtained under section 5(c)(3) must be part of the acquiring party's Form A application, and is, therefore, open to public inspection under section 5(a). We disagree.

Even if the commissioner obtained the report pursuant to his section 5(c)(3) authority, section 5(a) does not require the commissioner to open the report to public inspection. It is the acquiring party's duty to file the Form A application with the commissioner, and section 5(b) specifically enumerates the required contents of the Form A application. The report at issue was compiled at the direction of the commissioner and relates to the financial condition of the domestic insurer, not the acquiring party. We find no provision in article 21.49-1 that would require the commissioner to include in the acquiring party's Form A application information about the domestic insurer which he obtained pursuant to section 5(c)(3). Because section 5(a) only requires that the Form A application be open to public inspection, section 5(a) would not reach the report at issue.

Even if the commissioner obtained the report pursuant to section 5(c)(3), section 552.112 of the Government Code would except the report from disclosure. Section 552.112(a) excepts from disclosure "information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." Blue Cross is regulated by the department and is considered a "financial institution" for purposes of section 552.112(a). *See* Open Records Decision Nos. 637 at 4 (1996), 158 at 5-6 (1977). Thus, the report on Blue Cross's financial condition prepared by Coopers & Lybrand for the department is excepted from disclosure under section 552.112(a) of the Government Code.

Because we find that the report is excepted from disclosure under section 552.101, or alternatively under section 552.112(a), we do not address the other arguments against disclosure raised by the department and Blue Cross. We are resolving this matter with an

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<sup>1</sup>The department's letter states:

Under the Holding Company Act, the Department must consider, in part, whether the merger is unfair, prejudicial, hazardous, or unreasonable to policyholders and not in the public interest (the Insurance Code, Article 21.49-1 § 5(c)(1)(iv)). In this regard, please be advised the Department is currently inclined to exercise its statutory authority to retain an expert in analyzing the merger and associated valuation/consideration issues related to the BC/BX-Texas operations. As provided in the Insurance Code, Article 21.49-1 § 5(c)(3), all reasonable expenses incurred in connection with the valuation conducted by the expert shall be borne by BC/BS-Illinois (the acquiring party).

informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/mjc

Ref: ID# 119379

Enclosures: Submitted documents

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